No. 94-267

OCT 17 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

EDWARD W. TOTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner willfully attempted to evade or defeat his federal income tax liabilities, within the meaning of Section 523(a)(1)(C) of the Bankruptcy Code, 11 U.S.C. 523(a)(1)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 24 F.3d 806. The opinion of the district court (Pet. App. 8a-21a) is reported at 149 B.R. 829. The opinion of the bankruptcy court (Pet. App. 22a-37a) is reported at 141 B.R. 126.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1994. The petition for a writ of certiorari was filed on August 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a self-employed, independent insurance agent (Pet. App. 22a). From 1961 to 1973, he filed federal income tax returns and paid the taxes due (*id.* at 22a-23a). From 1974 to 1981, however, even though he knew that he owed taxes each year, petitioner failed to file federal income tax returns and did not pay the taxes due (*id.* at 9a-10a). Petitioner had no other debts that precluded him from paying his taxes during that period (*id.* at 11a).

In 1981, petitioner was indicted under 26 U.S.C. 7203 on three counts for failure to file federal income tax returns for 1974, 1975 and 1976 (Pet. App. 11a). Pursuant to a plea agreement, petitioner pled guilty to willfully failing to file a federal income tax return for 1976 and the government dismissed the counts relating to 1974 and 1975. As part of his sentence, petitioner was required to pay in full his 1976 tax liability and to file all delinquent returns (*id.* at 11a-12a).

In 1985, petitioner negotiated a payment plan with the IRS relating to his outstanding tax liabilities (Pet. App. 12a). He made some, but not all, of the payments required under the plan (*ibid.*).

2. In 1990, petitioner filed for relief under Chapter 7 of the Bankruptcy Code (Pet. App. 12a). He commenced an adversary proceeding seeking a determination that his pre-petition federal income tax liabilities were dischargeable. The government claimed that those liabilities were nondischargeable under 11 U.S.C. 523(a)(1)(C) because petitioner had willfully attempted to evade or defeat the taxes.

The bankruptcy court concluded that the taxes were dischargeable (Pet. App. 22a-37a). The court noted that taxes are nondischargeable if the debtor has "willfully attempted in any manner to evade or defeat" them (11

U.S.C. 523(a)(1)(C)). The court concluded that the language of this statute should be given the same meaning as 26 U.S.C. 7201, which makes it a felony for any person willfully to attempt in any manner to evade or defeat taxes (Pet. App. 28a-31a). In *Spies* v. *United States*, 317 U.S. 492, 499 (1943), this Court held that a felony conviction under 26 U.S.C. 7201 requires proof of an affirmative act constituting an evasion or attempted evasion of tax. Applying this interpretation of 26 U.S.C. 7201, the bankruptcy court determined in this case that, although petitioner voluntarily and intentionally failed to file his returns and pay his taxes, these mere "omissions" were insufficient to bring his tax liability within the exception to discharge of 11 U.S.C. 523(a)(1)(C) (Pet. App. 31a-32a).

3. On appeal to the district court, the government argued that the bankruptcy court erred in applying a criminal standard to determine the dischargeability of an income tax liability in a civil bankruptcy proceeding (Pet. App. 9a). The district court agreed, concluding that "the proper definition of 'willfully attempt to evade' in the context of an 11 U.S.C. 523(a)(1)(C) discharge case is that found in other civil cases—voluntary, conscious, and intentional" (Pet. App. 20a). The district court further concluded that 11 U.S.C. 523(a)(1)(C) contains no requirement of an affirmative act or commission (Pet. App. 20a). Because petitioner's failure to file returns and to pay his taxes was voluntary, conscious, and intentional, the district court held that petitioner had willfully attempted to evade or defeat his tax liability within the meaning of Section 523(a)(1)(C) (Pet. App. 21a).

4. The court of appeals affirmed. The court agreed with the district court that Section 523(a)(1)(C) of the Bankruptcy Code calls for application of a civil, rather than criminal, standard (Pet. App. 6a). The court held

that petitioner's tax liabilities were not dischargeable because he voluntarily, consciously, and intentionally failed to file his tax returns and pay his taxes (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 727 of the Bankruptcy Code, a debtor is generally discharged from all debts that arose before the filing of the bankruptcy petition. 11 U.S.C. 727(b). Under Section 523 of the Code, however, an individual debtor is not discharged "from any debt * * * for a tax * * * with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. 523(a)(1)(C).

The language of Section 523 is straightforward. Congress did not provide any specialized definitions for its terms. The words are therefore to be interpreted with their ordinary, everyday meaning. See *Commissioner* v. *Soliman*, 113 S. Ct. 701, 705-706 (1993); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966) (per curiam).

a. Courts have consistently interpreted the term "willful" in civil tax statutes to mean voluntary, conscious, or intentional. See, *e.g.*, *Domanus* v. *United States*, 961 F.2d 1323, 1326 (7th Cir. 1992); *Collins* v. *United States*, 848 F.2d 740, 742 (6th Cir. 1988). This comports with the common definition of a "willful" act as one done knowingly and purposely, rather than merely from negligence or inadvertence. See *Black's Law Dictionary* 1599-1600 (6th ed. 1990).

b. The statutory words "evade or defeat in any manner" plainly encompass a broad spectrum of conduct. "Evade" and "defeat" are used disjunctively in Section 523(a)(1)(C)—proof of either suffices to except a tax debt

from discharge under the statute. See 1A Singer, *Sutherland Statutory Construction* § 21.14 (4th ed. 1985).[1]

The common meaning of the term "evade"—in connection with tax obligations—is "to fail to pay or to minimize (taxes) in violation of law" (*Webster's Third New International Dictionary* 786 (1986)). See also *Black's Law Dictionary* 554 (6th ed. 1990)). The common meaning of the term "defeat"—in connection with any legal obligation—is "to prevent, frustrate, or circumvent as in the phrase to 'hinder, delay, or defeat a creditor'" (*id.* at 418).

c. Applying the ordinary meaning of these statutory terms, the court of appeals correctly held that petitioner's failure to file a tax return and failure to pay the taxes due represent a conscious, and therefore "willful," attempt "to evade or defeat his tax liability" (Pet. App. 7a). Petitioner's willful failure to file a return and to pay taxes for eight consecutive years frustrated and delayed, and thereby sought to defeat, his tax obligations.[2]

2. Petitioner does not contend that the decision in this case conflicts with the decision of any other court of appeals. Instead, petitioner asserts (Pet. 16) that the

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[1] The statutory phrase "in any manner" confirms that a broad variety of conduct is sufficient under the statute to trigger the discharge exception.

[2] Petitioner errs in contending (Pet. 18) that this understanding of Section 523(a)(1)(C) would deprive Section 523(a)(1)(B)(ii) of the Bankruptcy Code of any meaning. The latter subsection denies a discharge for the tax obligation of a debtor who filed a late tax return within the two-year period preceding commencment of the bankruptcy case. 11 U.S.C. 523(a)(1)(B)(ii). That provision operates without regard to whether the late filing was part of a willful attempt to evade or defeat the debtor's tax liability.

court of appeals interpreted the statute more broadly than other courts have in prior decisions.

That contention is not correct. Numerous other courts have interpreted Section 523(a)(1)(C) precisely as the court did in this case. These courts have agreed (i) that a tax liability is nondischargeable when there has been a voluntary, conscious and intentional attempt to evade or defeat taxes and (ii) that no overt act is required to except a tax debt from discharge under this statute. See, *e.g.*, *United States* v. *Friedus*, 165 B.R. 537, 541 (Bankr. E.D.N.Y. 1994); *Irvine* v. *Commissioner*, 163 B.R. 983, 987 (Bankr. E.D. Pa. 1994); *Griffith* v. *United States*, 161 B.R. 727, 733 (Bankr. S.D. Fla. 1993); *United States* v. *Hedgecock*, 160 B.R. 380, 384 (D. Ore. 1993).

3. Petitioner errs in contending (Pet. 13-16) that the decision in this case conflicts with this Court's decisions in *Spies* v. *United States*, *supra*, and *Sansone* v. *United States*, 380 U.S. 343 (1965). Those decisions involved Section 7201 of the Internal Revenue Code, which makes it a felony for any person willfully to attempt in any manner to evade or defeat any tax or its payment. 26 U.S.C. 7201. In *Spies* and *Sansone*, the Court held that a conviction under this felony statute requires proof of an "affirmative act"—rather than an "omission"—designed to evade or defeat taxes. See 317 U.S. at 498; 380 U.S. at 351. Petitioner asserts (Pet. 13) that the court of appeals erred in this case by failing similarly to require an "affirmative act" of tax evasion in order to except a tax from discharge under Section 523(a)(1)(C) of the Bankruptcy Code.

The "affirmative act" requirement under the felony statute in *Spies* and *Sansone*, however, has never been applied by this Court or any court of appeals in a civil proceeding arising under 11 U.S.C. 523(a)(1)(C). Petitioner's reliance on the criminal tax statute to support

his claim in this civil bankruptcy proceeding is misplaced.

In *Spies*, the Court interpreted what is now Section 7201 of the Internal Revenue Code to require proof of an "affirmative act" of tax evasion—rather than an "omission"—to establish a felony under that statute. In doing so, the Court relied on the "traditional aversion to imprisonment for debt" (317 U.S. at 498). The Court stated that, without the clearest mani-festation of congressional intent, it would not assume that mere knowing and intentional default in payment of a tax constitutes a criminal offense. *Ibid.*

The concern which motivated the Court's decision in *Spies* is not present in a civil bankruptcy or tax case. Petitioner is not subject to imprisonment. Instead, he is merely being denied the statutory privilege of a discharge of debts for taxes that he admittedly owes yet knowingly failed to report and pay (at a time when he could have done both). In enacting Section 523 of the Bankruptcy Code, Congress did not evidence an intent to discharge taxes that a taxpayer has sought to evade or defeat by willful omission. Nor is there any reason to create such a distinction. A prolonged failure to file returns—such as practiced by petitioner in this case—is no less effective for evading taxes than other "affirmative acts" of concealment, such as receiving income in cash or manipulating accounting records. A distinction between acts and omissions in this context would not faithfully implement the broad, plain language of the statute.

Civil statutes, such as the one at issue in this case, do no more than subject taxpayers to the liability that they have consciously sought to avoid. See *Domanus* v. *United States*, 961 F.2d at 1326; *Denbo* v. *United States*, 988 F.2d 1029, 1034-1035 (10th Cir. 1993). The court of appeals correctly concluded in this case (Pet. App. 5a-6a)

that the fact that a taxpayer consciously sought to avoid his liability through omission, rather than commission, is not an excuse to his continued, civil liability for his taxes under 11 U.S.C. 523(a)(1)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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